A **CHOCKALINGAM KMS KUMARAPPAN CHETTIAR**

v.

AZIZ HJ ASAHARI

B HIGH COURT MALAYA, ALOR STAR
ZAINAL ADZAM GHANI J
[CIVIL APPEAL NO: 11-56-2000]
26 APRIL 2004

C ***MONEYLENDERS:*** *Accounts - Statement of - Whether must be recorded in Bahasa Malaysia or English - Whether must be tendered or produced in court - Moneylenders Act 1951, s. 18(1), (2)*

The appellant, a licensed moneylender, alleged that he had lent RM24,000 to the deceased. The deceased died before the case D was heard and the appellant obtained an order to substitute the deceased's son – the respondent in this appeal – as the legal representative. The case for the respondent was that the deceased only borrowed RM10,000 from the appellant, the amount of which was fully settled. The magistrate dismissed the appellant's E case due to his failure to comply with the provisions of the Moneylenders Act 1951 ('Act'). The magistrate found that the appellant did not maintain any statement of account recorded in Bahasa Malaysia or English about the loan to the deceased. He also found that the appellant did not, at any time throughout the F hearing, produce a statement of account in court. This was the appellant's appeal against that decision. The appellant admitted that he kept a statement of account recorded in Tamil which, however, was not tendered in court as part of his case.

G **Held (dismissing the appeal):**

(1) It was not clear whether an account recorded in Tamil came within the meaning of "plain words" in s. 18(1) of the Act. As such, the account kept by the appellant in Tamil did not H seem to be contrary to the provision so long as the account was actually maintained in a permanent book and the figures were recorded in English numerals. However, pursuant to s. 18(2) of the Act, if a moneylender fails to maintain the account of every loan he made in the aforesaid permanent I book, the moneylender cannot enforce any claim in respect of any default by any of the borrowers. Thus, the appellant should have tendered or produced the account book showing

the respondent's account. This was a mandatory requirement and a condition precedent before the appellant could have the *locus standi* to sue the respondent for any default of the loan. Due to this omission by the appellant, his claim against the respondent was not properly proceeded with in the Magistrate's Court. It was the duty of the Magistrate's Court to give effect to the mandatory requirement in s. 18(2) of the Act. (paras 5, 6 & 7)

Case(s) referred to:
Menaka v. Ng Siew San [1972] 1 LNS 87 ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
Contracts (Malay States) Ordinance 1950, s. 66
Evidence Act 1950, s. 114(g)
Moneylenders Act 1951, ss. 18(1), (2), 19(4), 21
Moneylenders Ordinance 1951, ss. 8(b), (c), 16, 18

For the appellant - P Megalai; Meg Nacha & Co
For the respondent - Che Sharif Mat; M/s Taulan Rasul & Co

Reported by Suresh Nathan

JUDGMENT

Zainal Adzam Ghani J:

[1] The brief facts of this appeal is straightforward. The appellant is a licensed moneylender. According to the appellant on 24 October 1994 through a promissory note (P1) he lent RM24,000 to the deceased. As security to the loan, the deceased charged two pieces of land. The deceased died before the case was heard and the appellant obtained an order to substitute the deceased's son as the defendant and the legal representative. The case for the respondent was that the deceased only borrowed RM10,000 from the appellant, the amount of which was fully settled.

[2] The learned Magistrate dismissed the appellant's case with costs as according to the Magistrate the appellant failed to prove his case beyond reasonable doubt. The appellant according to the Magistrate failed to comply with the provisions of s. 18 and s. 19(4) of the Moneylenders Act 1951. On s. 18 of the Act, the Magistrate found that the appellant did not maintain any

A statement of account recorded in Bahasa Malaysia or English on the loan to the deceased given on 4 October 1994. The appellant admitted that he kept all his accounts in Tamil. The Magistrate also found that the appellant at no time produced in court throughout the hearing any statement of account. On s. 19(4) of
B the Act, the Magistrate found that the appellant did produce a receipt (P5) but however it was not stamped. The stamped receipt was never produced in court. The Magistrate raised the provision on adverse presumption under s. 114(g) of the Evidence Act 1950 against the appellant on the non-production of the two
C documents.

[3] In this appeal the appellant argued that the Magistrate erred in his findings, based on the following:

D (1) that s. 18 of the Act did not require the appellant to record the statement of account in Bahasa Malaysia or English, the provision only required the statement of account to be in English numerals;

(2) there was no challenge by the respondent that the appellant
E did maintain a statement of account although in Tamil;

(3) the existence of the statement of account is not relevant as the issue was whether it exist or not;

F (4) there was no more requirement for the receipt under s. 19(4) of the Act to be stamped as the relevant provision in the Stamp Act 1992 was amended (Item 64 in the schedule); and

(5) the adverse presumption under s. 114(g) of the Evidence Act 1950 was without basis.

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The appellant also argued that under s. 66 of the Contracts Act 1950 if the respondent received an advantage from a void contract he is liable to repay the appellant.

H **[4]** On the issue of the unstamped receipt, s. 19(4) of the revised Moneylenders Act 1951 (to comply with the amendment to the Stamp Act 1992) do not anymore have the words "duly stamped receipt". So the matter becomes a non-issue. Only the issues raised relating to s. 18 of the Act need to be examined.
I The appellant admitted that he kept a statement of account but it was all recorded in Tamil. However, the statement of account was not tendered in court as part of the appellant's case. Section 18 reads as follows:

Accounts to be kept in permanent books

18.(1) Every moneylender shall keep or cause to be kept a regular account of each loan made after the commencement of this Act clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages.

(2) If any person subject to the obligations of this section fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which default shall have been made. He shall also be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit, or in the case of a continuing offence, to a fine not exceeding one thousand ringgit for each day or part of a day during which such offence continues.

[5] The provision of s. 18(1) requires the appellant to maintain a regular account of every loan. The account must be recorded in a permanent book bound in such a manner to prevent the possibility of elimination of pages or interpolation or substitution of pages. The phrase "plain words" is not clarified or defined as to what language it should be unlike "English numerals". It is a *lacuna* like this that causes problem in court. Obviously it is not clear whether an account recorded in Tamil comes within the meaning of "plain words" or otherwise. As such the account kept by the appellant in Tamil do not seem to be contrary to the provision so long as the account is actually maintained in a permanent book and the figures are recorded in English numerals. In order for the court to determine this the appellant would have to produce the account book in evidence before the court.

[6] Section 18(2) is more explicit and it lay down the consequences for the non-compliance of the requirements of the preceding sub-section. If a moneylender fail to maintain the account of every loan he made in the aforesaid permanent book the moneylender cannot enforce any claim in respect of any default by any of the borrowers. This is a mandatory requirement to be performed by the appellant as a moneylender in all moneylending transactions that he conduct. The appellant counsel argued that the existence of the statement of account is not relevant to the case as contravention of s. 18(2) carries only penal consequences. This argument cannot be sustained, for to do so would be tantamount to ignoring the clear words of the first limb

of the provision. The penal consequences is only one aspect of the sub-section. Therefore in my judgment, before a moneylender can enforce any claim in court in relation to which there was a default by the borrower, he must as a condition-precedent satisfy the court that he had complied with that provision. Since this is a requirement under the law, it is irrespective whether or not the respondent in this case raised it or not in the suit. The appellant cannot run away from this requirement imposed on him by the law.

[7] The requirement to produce such evidence or proof in the suit is no different as that provided in s. 21 of the Act, which the appellant complied when he produced P1(B), though the later provision is more obvious. The court cannot give effect to one but not the other. Otherwise a moneylender would be free to circumvent that mandatory provision and deprive borrowers the protection granted by Parliament. Therefore I agree with the Magistrate, but on different grounds, that the appellant should have tendered or produced in his case the account book showing the account of the respondent. This is a mandatory requirement and a condition-precedent before the appellant can have the *locus standi* to sue the respondent for any default of the loan. On this omission by the appellant, I find that the claim by the appellant against the respondent was not properly proceeded before the Magistrate Court.

It was the duty of the Magistrate Court to give effect to the mandatory requirement in s. 18(2) of the Act.

[8] The appellant lastly argued that based on s. 66 of the Contracts Act 1950 any person who gained an advantage under a contract that is void is responsible to repay the person from whom he received it. As an authority the appellant relied on the case of *Menaka v. Ng Siew San* [1972] 1 LNS 87. Unfortunately, that case seems to be against the appellant. That case involved a moneylending transaction where the applicant lent to the respondent a sum of money and the respondent charged the land to the applicant as security for the loan. The respondent contended that the applicant's claim was illegal and void and/or unenforceable on the ground that the applicant contravened s. 8(b) and s. 8(c) of the Moneylenders Ordinance 1951 (revised as the Moneylenders Act 1951, with effect from 14 December 1989). On the issue whether the applicant was entitled to the restoration of the applicant's money still due under s. 66 of the

Contracts (Malay States) Ordinance 1950 (revised as the Contracts Act 1950 with effect from 1 July 1974), the learned judge distinguished between a breach of the provisions of the Moneylenders Ordinance which makes the transaction illegal and void and a breach which makes the transaction or contract statutorily unenforceable.

[9] The learned judge held that the breach in that case was against s. 8(b) and s. 8(c) which renders the moneylending transaction illegal and void but not statutorily unenforceable. As an example of the provision of which a breach would make the moneylending transaction statutorily unenforceable, the judge cited s. 16 and s. 18 of the Moneylenders Ordinance. The learned judge stated:

> Before dealing with the applicability of section 66 to the present case, it is necessary to consider the effect of violating the penal provisions of sections 8(b) and 8(c) on a moneylending transaction. Learned counsel for the applicant contends that the effect of such violation renders the transaction illegal and void but not unenforceable. It is argued that there is a difference between provisions in the Moneylenders Ordinance which expressly make a contract unenforceable in case of non-compliance and those which are silent as regards enforceability. Thus, unlike, for example, sections 16 and 18, the provision of section 8 does not expressly state that a contract or security is unenforceable if a person being licensed as a moneylender carries on such business in any name other than his authorised name, or if he enters into any agreement with respect to any advance or repayment of money, or takes any security for money otherwise than in his authorised name. In my judgment, there is some force in this argument, and I am inclined to the view that non-compliance with either section 8(b) or 8(c) renders a moneylending transaction illegal and void, but it does not make the transaction statutorily unenforceable. It is contended that the distinction is important in that where an agreement or a contract is unenforceable by statute, the remedy under section 66 of the Contracts (Malay States) Ordinance will not be available.

[10] Further the learned judge again specifically referred to s. 18 of the Moneylenders Ordinance and the consequences of a breach of that provision:

> Learned counsel for the respondent relied on the case of *Kasumu & Ors. v. Baba-Egbe* and *Govind Singh v. Vali Mohammad* for the proposition that section 66 of the Contracts Ordinance cannot apply to the Moneylenders Ordinance. As regards *Kasumu*'s case,

A I do not think that is what their Lordships of the Privy Council decided in that case. There it was found that the moneylender had contravened section 19 of the Nigerian Moneylenders Ordinance which imposes a duty on a moneylender to keep proper account books – which is similar to our section 18. As stated earlier on, our section 18 of the Moneylenders Ordinance expressly makes a B contract unenforceable if it is not complied with. But in the instant case, we are not dealing with section 18.

[11] From the judgment it is therefore clear that a breach of s. 18 of the Moneylenders Ordinance would render the C moneylending transaction statutorily unenforceable and as such the remedy under s. 66 of the Contracts Ordinance 1950 will not be available. The only way a moneylender can show that he has complied with the provisions of s. 18 of the Act is by producing in evidence the account book properly kept and recorded D according to that prosivion. On the inapplicability of s. 66 of the Contracts Act 1950 I would add a further ground; ie, since the provision of s. 18(2) of the Moneylenders Act 1950 specifically stipulate that a breach of the provision of subsection (1) would render a moneylending transaction unenforceable, that provision E overrides the general provision of s. 66 of the Contracts Act 1950. In such a situation the maxim *generalibus specialia derogant* applies. In the Federal Court case of *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285, Raja Azlan Shah CJ (as His Highness was then), said:

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> *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law ... It would be erroneous to apply expressions used and provisions made in one statute to another G and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their H colour from the context in which they appear.

[12] This appeal is therefore dismissed with costs.

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